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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953.

No. 473

BUTCHER & SHERRERD and FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HONORABLE GEORGE A. WELSH and the Other Judges of the United States District Court for the Eastern District of Pennsylvania.

HARRY J. ALKER, JR., and MAMIE DuBAN, Individually and as Executrix of the Estate of ALFRED A. DuBAN, Deceased,

Interveners-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

FRANCIS E. WALTERS,
Easton, Pa.,
EDWIN HALL, II,
HARRY J. ALKER, JR.,
1505 Land Title Bldg.,
Philadelphia 10, Pa.,
Counsel for Petitioners.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Specification of Errors to Be Urged	6
Reasons for Granting the Writ	6
Argument	8
(1) The Decision of the Court Below Is Contrary to the Principle Laid Down by the Supreme Court in Ex Parte Fahey, 332 U. S. 258, That Writs of Mandamus and Prohibition Are Extraordinary Remedies Which Should Be Reserved for Extraordinary Cases	8
(2) The Decision of the Court Below Is Contrary to the Very Meaning and Purpose of Subsections 5 and 6 of Rule 60-B as Amended	10
(3) The Decision of the Court Below Is in Conflict With the Statement of Principle by the Court of Appeals for the Second Circuit in Perlman v. 322 West Seventy-Second Street Co. Inc., 127 F. 2d 716, Where the Court Held that Rule 60-B Did Not Require Permission of the Appellate Court for the District Court to Reopen a Matter	13
(4) The Question Presented Is of Utmost Importance Because It Deals With the Proper Construction and Interpretation of Rule 60 (B) of the Rules of Civil Procedure for the District Courts. It Concerns the Jurisdiction of Those Courts. The Precise Question Has Never Been Previously Passed Upon by This Court	15
Conclusion	16

INDEX (Continued).

	Page
DOCKET ENTRIES AND PERTINENT PARTS OF THE RECORD IN No. 10,977 IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT	17
Docket Entries	17
Notice of Appeal	19
Entry of Appearance	20
Petition for Extension of Time for Filing Brief and Appendix	21
Order	24

TABLE OF CASES CITED.

	Page
Carr, et al. v. Donohoe, 201 F. 2d 426 (1953)	9
Ex parte Fahey, 332 U. S. 258	6, 8, 9
Gulf Research & Development Co., et al. v. Leahy, et al., 193 F. 2d 302 (1951)	8, 9
Klapprott v. U. S., 335 U. S. 601	15
Perlman v. 322 West Seventy-Second Street Co., Inc., 127 Fed. 2d 716	7, 13
In Re Standard Gas & Electric Co., 63 Fed. Supp. 876	13, 14
U. S. Alkali Export Ass'n. v. U. S., 325 U. S. 196 (1945)	9

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Federal Rules of Civil Procedure, Rule 60-B	2, 6, 7, 10, 11, 12, 13, 14, 15
Moore's Federal Rules and Official Forms, p. 278 (1951 Edition)	12
United States Code, Section 1254, Judiciary and Judicial Procedure, 28 U. S. C. A. 1254	2

IN THE

Supreme Court of the United States.

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No.

BUTCHER & SHERRERD AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HONORABLE GEORGE A. WELSH AND THE OTHER JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

HARRY J. ALKER, JR., AND MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED,

Interveners-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 5, 1953, and rehearing denied August 28, 1953.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit is reported in 206 F. 2d 259.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 5, 1953, and rehearing denied on August 28, 1953. The jurisdiction of this Court is invoked under Section 1254 of the United States Code, Judiciary and Judicial Procedure, 28 U. S. C. A. 1254.

QUESTIONS PRESENTED.

1. Should peremptory writs of mandamus and prohibition be issued against the judges of the District Court by the Court of Appeals when a matter can readily be determined through the normal appeal channels, and when in fact an appeal is actually pending to the Court of Appeals.

2. When a matter has once been appealed to the Court of Appeals and denied, does the District Court thereafter by virtue of the provisions of Rule 60 B-5 and 6 of the Rules of Civil Procedure for the United States District Courts have the jurisdiction and power to grant a new trial without first obtaining the approval of the Court of Appeals?

STATEMENT OF THE CASE.

Respondents, Butcher & Sherrerd and Fidelity-Philadelphia Trust Company, Trustee, on December 3, 1952, applied to the Court of Appeals for the Third Circuit for writ of mandamus and writ of prohibition against Honorable George A Welsh and the other Judges of the United States District Court for the Eastern District of Pennsylvania. Your petitioners asked leave to intervene, and said leave was granted by the Appeals Court on December 29, 1952. On August 5, 1953, after a hearing, the Court of Ap-

peals granted the writs of mandamus and prohibition. A rehearing was denied on August 28, 1953.

The writs of mandamus and prohibition were sought by the Respondents because Judge Welsh had granted your petitioners a new trial in Civil Action No. 3047 in the District Court for the Eastern District of Pennsylvania.

Not only did the respondents seek the above-mentioned writs, but they also filed an appeal with the Court of Appeals for the Third Circuit, being No. 10,977 in the Court of Appeals. That appeal is still pending. (pp. 17-24 *infra.*)

Civil Action No. 3047 in the said District Court was an action by Federal Deposit Insurance Corporation against Harry J. Alker, Jr., and Mamie DuBan, individually and as executrix of the estate of Alfred DuBan, deceased, and National Dairy Products Corporation. The plaintiffs in that action, after filing several amended complaints, sought by a proceeding in equity (R. 82-86) to recover from the defendant Alker a money judgment and an order on National Dairy Products Corporation directing it to transfer the registration of 4400 shares of its capital stock from the name of Alfred A. DuBan to the name of Federal Deposit Insurance Corporation, which had been pledged with the loan hereinafter referred to and conditioned upon the agreement hereinafter referred to.

That action by the Federal Deposit Insurance Corporation was instituted because Alker had a large loan with the Integrity Trust Company for which he had deposited collateral belonging to himself and several other persons as security, together with certain insurance policies which had been extended and renewed in 1936 for a period of ten years by the Integrity Trust Company when Alker gave the Integrity Trust Company new renewal notes in place of the original notes. In January, 1940, the Federal Deposit Insurance Corporation claimed it loaned the Integrity Trust Company, a state bank which had closed, about $20,000,000 and took as collateral various assets of the bank; stepped into the shoes of the Integrity Trust Company as respects the note of Alker and collateral deposited for this partic-

ular loan and other banking assets of the Integrity Trust Company.

Alker continued to pay the interest on the loan regularly to F. D. I. C., made several payments on account of the principal and also maintained the insurance for the benefit of the F. D. I. C. the same as he had done for the Integrity Trust Company.

In January, 1943, the F. D. I. C., when there was no default, after notice to Alker, sold at a private sale to itself the collateral deposited for this particular loan and then instituted suit to recover the balance in cash from Alker, and further requested an order by the Court for the transfer of the registration of the DuBan shares of National Dairy stock to the name of the F. D. I. C. Alker defended against this course of action by the F. D. I. C. on the grounds that the F. D. I. C. had no right at that time to sell the collateral for the loan and request the transfer of the National Dairy stock because there was an oral agreement between him, Mr. DuBan and the now defunct Integrity Trust Company that the collateral would not be disturbed for the term of the insurance unless in the meantime the security values had risen so that all parties concerned could recover their equities.

A trial was held before the Honorable George A Welsh without a jury and judgment entered against Alker in the amount of $117,581.35 on November 8, 1944, together with an order on National Dairy Products Corporation directing it to transfer the 4,400 shares of capital stock of National Dairy belonging to DuBan to the name of the Federal Deposit Insurance Corporation as owner, and further directing payment to F. D. I. C. of all dividends payable on such stock since November 20, 1942. Motions for a new trial were duly filed and refused. An appeal was taken to the Court of Appeals which affirmed the action of the lower court. A petition for certiorari was denied by the Supreme Court as were petitions for rehearing.

Thereafter a motion for a new trial on the *ground of after-discovered evidence was filed.* An application was made to the Appellate Court for leave to consider this motion. This application was refused. A petition for certiorari was filed in the Supreme Court. That was refused as was a petition for rehearing.

On July 28, 1948, the Federal Deposit Insurance Corporation presented a motion for leave to substitute the Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company, as party plaintiff on the ground that F. D. I. C. had received full payment of its loan to Integrity Trust Company. Alker opposed this motion, and subsequently filed a renewal of the motion for new trial. On March 3, 1949, the trial judge granted the motion for new trial and denied the motion to substitute the Secretary of Banking for F. D. I. C. as party plaintiff. The F. D. I. C. thereupon applied to the Appellate Court for writs of mandamus and prohibition against the order of March 3, 1949. On May 9, 1949, an order granting new trial was vacated and an order substituting the Secretary of Banking as party plaintiff was granted. Alker appealed from both of these orders, the Appellate Court on September 7, 1950, sustaining the order vacating the motion for new trial but reversing the order substituting the Secretary of Banking as party plaintiff. On September 7, 1950, the judgment against Alker was marked to the use of Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company.

On June 12, 1951, the record shows the judgment in the above matter against Alker was marked to the use of Butcher & Sherrerd and Fidelity-Philadelphia Trust Company, Trustee, by the Secretary of Banking, Commonwealth of Pennsylvania, the said assignees having taken the judgment together with other assets of Integrity Trust Company on account of their claims against said trust company.

On April 24, 1952, a motion for new trial in this case was filed with Judge Welsh, setting forth various new rea-

sons. After a hearing, Judge Welsh entered an order granting a new trial on December 2nd, 1952, on the ground that a denial of the motion for new trial would, in his opinion, "result in doing harm to the cause of justice" (R. 10a).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that the District Court Judge did not have jurisdiction to grant a new trial;

(2) In holding that Rule 60-B of the Federal Rules of Civil Procedure does not confer upon the District Courts the power to alter or amend a judgment which has been affirmed by the Court of Appeals or the Supreme Court.

(3) In allowing the writs of mandamus and prohibition to issue.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below is contrary to the principle laid down by Supreme Court in *Ex Parte Fahey,* 332 U. S. 258, that mandamus and prohibition are extraordinary remedies which should be reserved for extraordinary cases. There is nothing extraordinary or so unusual in the present case which could not be determined by the appeal which is still pending in the Court below.

2. The decision of the Court below is contrary to the very meaning and purpose of subsections 5 and 6 of Rule 60-B as amended.

3. The decision of the Court below is in conflict with the statement of principle by the Court of Appeals for the

Second Circuit in *Perlman v. 322 West Seventy Second Street Co., Inc.*, 127 Fed. 2d 716, where the Court held that Rule 60-B did not require permission of the Appellate Court for the District Court to reopen.

4. The question presented is of utmost importance because it deals with the proper construction and interpretation of Rule 60-B of the Rules of Civil Procedure for the District Courts. It concerns the jurisdiction of the Courts. The *precise question has not been previously passed upon by this Court.*

ARGUMENT.

(1) The Decision of the Court Below Is Contrary to the Principle Laid Down by the Supreme Court in Ex Parte Fahey, 332 U. S. 258, That Writs of Mandamus and Prohibition Are Extraordinary Remedies Which Should Be Reserved for Extraordinary Cases.

The writs obtained by the respondents are unusual and extraordinary. When a litigant to a cause of action is not satisfied with the action of a lower court, the ordinary and usual remedy is to take an appeal. This has been done by the respondents in this matter *after* they filed their application for writs of mandamus and prohibition. Such writs are reserved for really extraordinary cases; their use will not be countenanced as substitutes for an appeal. Thus in *Ex parte Fahey,* 332 U. S. 258, the Supreme Court of the United States by Mr. Justice Jackson said:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes."

This lower Court, the Court of Appeals for the Third Circuit, adhered to the foregoing decision in the recent case of *Gulf Research & Development Co., et al. v. Leahy, et al.,* 193 F. 2d 302 (1951). That was a case involving a patent infringement, wherein the Federal District Court in California had transferred the case to the Federal District Court in Delaware on the ground that venue was in Dela-

ware. The District Court for the District of Delaware entered an order denying a motion to re-transfer the case to the Federal District Court in California. An application for writ of mandamus was made to Court of Appeals for the Third Circuit, which this Court refused. The Third Circuit Court held that the parties had an adequate remedy by appeal and refused to grant the writ of mandamus. In that case the Court cited and quoted from *Ex Parte Fahey, supra.* The Court further quoted from the case of *U. S. Alkali Export Ass'n. v. U. S.*, 325 U. S. 196, 202-203 (1945), as follows:

> "It is evident that hardship is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to certiorari or other of the extraordinary writs as a means of review. In such cases appellate courts are reluctant to interfere with decisions of lower courts, even on jurisdictional questions, which they are competent to decide and which are reviewable in the regular course of appeal."

In the matter now before the Court there is no doubt that the petitioners have an adequate remedy by an appeal after a trial of the case on its merits, which appeal has actually been filed and is pending before the Court of Appeals, being No. 10,977 in that Court. (pp. 17-24 *infra.*)

The respondents contend that the trial judge erred and lacked jurisdiction to enter the order of December 2nd granting a new trial. If that is so, then certainly on an appeal after a trial of the case that question can be gone into and properly determined by the Appellate Court. The mere fact that the respondents may be put to inconvenience and expense does not constitute ground for invoking mandamus power. *Gulf Research & Development Co. v. Leahy (supra); Carr, et al. v. Donohoe,* 201 F. 2d 426 (1953).

There is nothing really extraordinary in this matter which cannot be satisfactorily taken care of at the proper time on an appeal. There is, therefore, no reason why an extraordinary remedy, such as mandamus and prohibition, should be invoked in this matter.

(2) The Decision of the Court Below Is Contrary to the Very Meaning and Purpose of Subsections 5 and 6 of Rule 60-B as Amended.

The Court of Appeals held that the District Court lacked the power to grant a new trial where the judgment has been affirmed by an Appellate Court.

The present case is not just an ordinary action at law for damages or to recover a certain sum of money. The judgment entered by the Court as a result of the trial was not only for a certain sum of money but also contained a direction that 4,400 shares of stock of National Dairy Products Corporation be transferred and registered in the name of F. D. I. C. as owner, and that all dividends declared on that stock since November 20, 1942, be paid to F. D. I. C. *The judgment entered by the Court (R 27-A, 28-A) clearly shows that this action was originally brought on the equity side of the District Court, not the law side. Keeping that always in mind,* the petitioners claim that Judge Welsh had the right to grant a new trial in this case because the recent amendments to Rule 60-B of the Rules of Civil Procedure which are as follows:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or ex-

trinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) *the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;* or (6) *any other reason justifying relief from the operation of the judgment.* The motion shall be made within a reasonable time; and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U. S. C., Title 28 § 118 (Revised Title 28, U. S. C. § 1655), or to set aside a judgment for fraud upon the Court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." (Italics supplied.)

Subdivisions (5) and (6) are both applicable to the present case.

The purpose and effect of these amendments to Rule 60-B is to broaden and increase the control of the Trial Court over a case even after judgment has been entered. This is particularly true in cases like the one now before the Court where it is no longer equitable that the judgment should have prospective application.

In drafting and approving these amendments to Rule 60-B it must have been contemplated and intended to give to the Trial Court the right to grant relief without seeking

the approval of the Appellate Court; otherwise the provisions of 60-B would be meaningless. This is clearly shown by the very language of the amendments. They expressly provide that "this rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment, order, or proceeding. . . ." They thereby confer upon the Trial Court itself the power to grant relief without requiring the approval of the Appellate Court. Moreover, the above quoted language clearly shows that it was intended to give the Trial Court itself the right to grant a new trial because it by so doing eliminated the necessity of an independent action such as a bill in equity or petition. Since the need of independent action is thus expressly eliminated, it follows that a new trial is the only way and natural way in which the Trial Court can possibly grant the necessary relief.

In discussing the 1946 amendments to Rule 60-B in Moore's Federal Rules and Official Forms, p. 276, it is pointed out that the amended rule 60-B provides for two types of relief. "One procedure is by motion in the Court and in the action in which the judgment was rendered." That is precisely what was done in this case. A motion was presented to the trial Court and in the action in which the judgment was rendered.

On p. 278 of Moore's Federal Rules and Official Forms (1951 Edition), it is said that Rule 60-B is to afford relief from *final* judgments. No limitation is set on final judgments which would include ones appealed as well as those not appealed. *Nowhere in this work is any mention made of the fact that the permission of the Appellate Court has to be first obtained before relief can be granted under 60-B. If that had been the intention of the drafters of the rules, they certainly would have said so instead of using the broad general terms they did in the amendments to Rule 60-B.*

(3) The Decision of the Court Below Is in Conflict With the Statement of Principle by the Court of Appeals for the Second Circuit in Perlman v. 322 West Seventy-Second Street Co. Inc., 127 F. 2d 716, Where the Court Held that Rule 60-B Did Not Require Permission of the Appellate Court for the District Court to Reopen a Matter.

The Court of Appeals for the Third Circuit held that Judge Welsh erred when he granted the new trial because he was of the opinion that the recent amendments to Rule 60-B conferred upon the trial Court the power to grant relief from the operation of a judgment without prior approval of the Appellate Court. *In so ruling, the Third Circuit is in conflict with the statement by Judge Clark of the Second Circuit in Perlman v. 322 West Seventy-Second Street Co. Inc., 127 Fed. 2d 716, 719, when he said, "In the view of the writer of this opinion, at least, Federal Rules of Civil Procedure, Rule 60 (b) does not require a preliminary petition in the Appellate Court for permission to reopen in the District Court." That case involved a question of reopening a matter in bankruptcy. That case was decided on April 11, 1942, long before the amendments of 1946 which greatly liberalized Rule 60 (B). In 1942, Rule 60 (B) was much more limited and restricted. So if in its limited and restricted sense Judge Clark thought it was nevertheless sufficient to permit a case to be reopened without obtaining the prior approval of the Appellate Court, certainly that should be all the more so after the amendments of 1946 liberalized and broadened the rule. The conflict between the Second and Third Circuits is thus apparent and the need for clarification is obvious.*

The ruling of the Third Circuit is also in conflict with the principle of equity as set forth in Re Standard Gas & Electric Co., 63 Fed. Supp. 876. On p. 878 the Court said:

> *". . . A Court of Equity after the receipt of a mandate may consider a radical change of circum-*

stances which has occurred prior to the time of entering its decree."

The second Amended Complaint (R. 82-86) and the original judgment (R. 27A-28A) clearly show this was from the beginning an equitable matter because the original plaintiff sought more than just a money judgment.

There has been a great change in circumstances in this case. *The original plaintiff was Federal Deposit Insurance Corporation. On September 7, 1950, the original judgment was marked to the use of Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company (R. 27A). Before this was done, F. D. I. C. had in open court stated it had been fully repaid the money it originally loaned to take care of Integrity Trust Company. Then on June 12, 1951, the matter was marked to the use of present respondents; one a Pennsylvania brokerage firm and the other a Pennsylvania state banking institution. The original opinion of the Court of Appeals for the Third Circuit (151 F. 2d 907) was based upon a so-called "public policy" to protect F. D. I. C.,* this being the same "public policy" as was applied to national banks. *But this "public policy" would have no application to either the Secretary of Banking of Pennsylvania* or the present respondents.

The Attorney General for the Commonwealth of Pennsylvania realizing that this so-called "public policy" had no application to the Secretary of Banking as Receiver, advised the trial court that he had no objections to the granting of a new trial. *Hence the aforementioned equitable principle should apply to this case irrespective of Rule 60-B.*

The Third Circuit in its opinion 206 F. 2d 259, 262, held that *In re Standard Gas & Electric Co.* (*supra*) did not apply because a final judgment was not involved. But the Third Circuit failed to note that the equitable principle laid down in *In Re Standard Gas & Electric Co.* (*supra*) uses the language *"After receipt of a mandate". For a*

mandate to be involved, there must be a final decree, because mandates do not issue after only interlocutory decrees. Therefore, on the basis of the principles of equity, irrespective of any procedural rules, the Trial Court had the absolute power to grant a new trial.

(4) The Question Presented Is of Utmost Importance Because It Deals With the Proper Construction and Interpretation of Rule 60 (B) of the Rules of Civil Procedure for the District Courts. It Concerns the Jurisdiction of Those Courts. *The Precise Question Has Never Been Previously Passed Upon by This Court.*

The importance of the question involved is apparent. If the Third Circuit's decision is correct in this case then subdivisions 5 and 6 of Rule 60 (B) as amended are practically meaningless. If before the trial Court can grant relief, permission of the Appellate Court must still be sought where a case has been previously appealed to the Circuit or Supreme Courts, then there was no object in having subsections 5 and 6 to Rule 60 (B), because that had been the law prior to the said amendments.

The precise question has not been passed upon by the Supreme Court. However, in Klapprott v. U. S., 335 U. S. 601, even though certiorari had been denied by the Supreme Court, the Supreme Court held that Rule 60 (B) applied and that the District Court should have granted the motion to vacate the default judgment revoking citizenship.

The drafters of subsections 5 and 6 to Rule 60 (B) must have contemplated that the jurisdiction of the trial judge was to be enlarged to permit him to act as Judge Welsh did in this matter and grant relief when he felt such was equitable and proper without first requiring approval of the Appellate Court. If the intention and purpose was otherwise, language to that effect could easily have been set forth in subsections 5 and 6. However, this was not done.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

FRANCIS E. WALTERS,
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EDWIN HALL, II,
HARRY J. ALKER, JR.,
1505 Land Title Bldg.,
Philadelphia 10, Pa.,
Counsel for Petitioners.

DOCKET ENTRIES AND PERTINENT PARTS OF THE RECORD IN NO. 10,977 IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

DOCKET ENTRIES.

FEDERAL DEPOSIT INSURANCE CORPORATION TO THE USE OF SECRETARY OF BANKING, COMMONWEALTH OF PENNSYLVANIA, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER AND SHERRERD AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Appellants,

v.

HARRY J. ALKER, JR. AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED DUBAN, DECEASED, AND NATIONAL DAIRY PRODUCTS CORPORATION (3047 Civil Action).

For Appellant
H. WILSON WHITE
HOWARD H. RAPP

For Appellee
EDWIN HALL, 2D
ALFRED D. BRUCE
HARRY J. ALKER, JR.
A. EDWIN GILFILLAN

Jan. 9, 1953. Notice of Appeal filed in District Court, Dec. 4, 1952 filed.

Jan. 9, 1953. Record filed.

Jan. 9, 1953. Exhibits received from Clerk of District Court.

Jan. 9, 1953. Petition to extend time for filing appellant's brief and appendix until determination by this Court of No. 10948 filed.

Jan. 15, 1953. Appearance of W. Wilson White, Howard H. Rapp, for appellants Butcher and Sherrerd and Fidelity-Philadelphia Trust Company, Trustee, filed.

Jan. 19, 1953. Heard on appellant's petition to extend time for filing brief and appendix until after final determination by this court of mandamus proceeding in 10948 Coram: Goodrich, Staley, Hastie Circuit Judges.

Jan. 19, 1953. Order extending time for filing appellant's brief and appendix until after determination by this court of mandamus proceeding in 10948 filed.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL DEPOSIT INSURANCE CORPORATION TO THE USE OF SECRETARY OF BANKING, COMMONWEALTH OF PENNSYLVANIA, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,	Received Dec. 8, 1952
v.	No. 3047
HARRY J. ALKER, JR., MAMIE DUBAN INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED DUBAN, DECEASED, AND NATIONAL DAIRY PRODUCTS CORPORATION	Notice of Appeal Filed Dec. 4, 1952

NOTICE OF APPEAL.

To the Clerk United States Court of Appeals Third Circuit, Philadelphia, Pa.

Please be advised that the Plaintiff in the above entitled case has this day filed Notice of Appeal to the United States Court of Appeals, Third Circuit, Philadelphia, Pennsylvania, from a Judgment or Decree of this Court by Hon. George A. Welsh.

Leo A. Lilly, Clerk
J. A. Comery
By J. A. COMERY
Deputy Clerk

Received & Filed
Jan. 9, 1953
Ida O. Creskoff
Clerk

For Appellant: W. Wilson White, Esq.
Howard H. Rapp, Esq.
For Appellee: Edwin Hall, 2nd, Esq.
Alfred D. Bruce, Esq.
Harry J. Alker, Jr., Esq.
A. Edwin Gilfillan, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,977

FEDERAL DEPOSIT INSURANCE CORPORATION TO THE USE OF SECRETARY OF BANKING, COMMONWEALTH OF PENNSYLVANIA, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER AND SHERRERD AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

v.

HARRY J. ALKER, JR. ET AL.

ENTRY OF APPEARANCE.

The Clerk will enter our appearance for the Appellants, Butcher & Sherrerd and Fidelity-Philadelphia Trust Company, Trustee, respectively.

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P. O. address 19th Floor Land Title Bldg.
Philadelphia 10, Pa.
HOWARD H. RAPP
P. O. address, 2107 Fidelity-Philadelphia Trust Building
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Received & Filed
Jan. 15, 1953
Ida O. Creskoff
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Received & Filed
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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION TO THE USE OF SECRETARY OF BANKING, COMMONWEALTH OF PENNSYLVANIA, TO USE OF BUTCHER AND SHERRERD AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Appellants,

v.

HARRY J. ALKER, JR. ET AL.

PETITION FOR EXTENSION OF TIME FOR FILING BRIEF AND APPENDIX.

To the Honorable the Judges of the Said Court:

Butcher and Sherrerd and Fidelity-Philadelphia Trust Company, Trustee, Appellants, respectfully represent to the Court

1. The appeal in this case is from the order of the Honorable George A. Welsh, Judge of the District Court of the United States for the Eastern District of Pennsylvania, entered on December 2, 1952, granting a new trial to the defendants. The appeal involves primarily the jurisdiction and power of the Judge to enter said order.

2. The same question is presented to this Court by the application of these appellants for writ of mandamus and prohibition directed to the Honorable George A. Welsh heretofore filed with this Court in No. 10,948. This court on December 5, 1952, issued a rule on the Honorable George A. Welsh to show cause why the writs should not be granted

and the proceedings will be heard and determined in due course.

3. The appeal in this case was taken as a supplemental measure to the mandamus and prohibition proceeding and for the further purpose of bringing the record in the District Court before this Honorable Court. If the prayers of the application for writs of mandamus and prohibition be granted, the appeal will be moot.

Wherefore, your petitioners pray that they be granted an extension of time for filing their brief in this appeal until the Court shall have heard and determined the proceeding in No. 10,948.

And your petitioners will ever pray, etc.

W. Wilson White
Howard H. Rapp

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

W. WILSON WHITE, being duly sworn according to law, deposes and says that he is of counsel for the appellants in the foregoing case; that he makes this affidavit on their behalf because all the facts set forth in the foregoing petition are of record; and that such facts are true and correct.

W. WILSON WHITE

Sworn to and subscribed before me this 8th day of January A. D. 1953.

PEARL H. LOVERING
(Seal) *Notary Public*
My Commission Expires January 29, 1955

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,977

FEDERAL DEPOSIT INSURANCE CORPORATION TO THE USE OF SECRETARY OF BANKING, COMMONWEALTH OF PENNSYLVANIA, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER AND SHERRERD AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Appellants,

v.

HARRY J. ALKER, JR. ET AL.

ORDER.

Present: Goodrich, Staley and Hastie, Circuit Judges.

Upon consideration of the petition of Appellants, and after hearing,

It is Ordered that the time for filing Appellants' brief and appendix in the above entitled cause be, and it is hereby extended until after final determination by the Court of the mandamus proceeding in No. 10,948.

By THE COURT,

GOODRICH,
Circuit Judge

January 19, 1953
Received & Filed
January 19, 1953
Ida O. Creskoff
Clerk

DEC 19 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1953 No. 473

HARRY J. ALKER, JR., and MAMIE DUBAN,
Individually and as Executrix of the Estate of
Alfred A. DuBan, Deceased,
Petitioners

v.

BUTCHER AND SHERRERD and FIDELITY-PHILADELPHIA
TRUST COMPANY, Trustee
Respondents

Answer to Petition for Certiorari to the United States Court of Appeals for the Third Circuit

THOMAS RAEBURN WHITE,
THOMAS B. K. RINGE,
Counsel for Respondents.

WHITE, WILLIAMS & SCOTT,
MORGAN, LEWIS & BOCKIUS,
of Counsel.

The Legal Intelligencer, 10 S. 37th St., Phila.

INDEX

	Page
Counterstatement of the Case	1
Argument	3

TABLE OF CITATIONS

In re Potts, 166 U. S. 263, at p. 265	4
National Brake Company v. Christenson, 254 U. S. 425, at p. 430	4

COUNTERSTATEMENT OF THE CASE

This case has been before the courts more than ten years. It was originally an action by the Federal Deposit Insurance Corporation in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 3047, to recover from Harry J. Alker, Jr., the amount of a loan made to him by Integrity Trust Company on a demand collateral note. Integrity Trust Company had closed and Alker's note, together with its accompanying collateral, had been pledged with the F.D.I.C., together with other banking assets, as security for a loan of approximately $20,000,0000 made by the F.D.I.C. to the bank for use in connection with the liquidation of its affairs.

The note not being paid, F.D.I.C. sold the collateral and sued for the resulting deficiency. Alker defended on the ground that there was an oral agreement made with him by the bank that it would "not disturb the loan or the collateral until security values had risen to such a point that Alker could recover his equity" (See opinion of Court of Appeals, 151 F. (2d) 907). After a trial, judgment was entered for the plaintiff against Alker in the amount of $117,581.35, and an order was issued against National Dairy Products Corporation directing it to transfer to F.D.I.C. certain of its shares of capital stock, which stock had been loaned by Alfred DuBan, its owner, to Alker for use as collateral, and which the company had declined to transfer into the name of the F.D.I.C. Subsequently Mamie DuBan, the daughter of the former owner and executrix of his estate, was substituted as a nominal party defendant in the suit. This judgment and order were entered on November 8, 1944 (Appendix 27a); motions for

new trial were dismissed November 30, 1944 (Appendix 28a). The judgment was affirmed by the Court of Appeals for the Third Circuit filed November 7, 1945 (151 F. (2d) 907). Certiorari was denied by this Court (327 U. S. 799) as were five petitions for rehearing.* The mandate of affirmance was finally returned to the District Court on November 24, 1946 (Appendix 29a).

Following return of the mandate affirming the judgment, a motion for new trial was made on the ground of after-discovered evidence. Pending the hearing on this motion, petitioners made application to the Court of Appeals for leave to entertain it; this petition was denied (163 F. (2d) 123). A subsequent petition for rehearing alleging certain additional facts was denied (164 F. (2d) 469), and the Court of Appeals expressly denied leave to the court below to rehear a motion for new trial (Appendix 31a). This Court denied certiorari (334 U. S. 827), and four petitions for rehearing.** Further stay of the mandate was requested but denied by the Court of Appeals (169 F. (2d) 336). Certiorari was denied by this Court (336 U. S. 953).

On August 25, 1948, petitioners filed a renewal of motion for new trial, and at the same time filed with the Court of Appeals a petition for reconsideration of its order denying leave to make a motion for new trial. This petition was dismissed by the Court of Appeals, but petitioners nevertheless proceeded with their motion, and on March 3, 1949, District Judge Welsh entered an order granting a new trial (Appendix 35a). F.D.I.C. promptly applied for writs of mandamus and prohibition in order to vacate the order, and District Judge Welsh, who had granted the new

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* 328 U. S. 877, 879, 881; 329 U. S. 823, 830.
** 334 U. S. 862; 335 U. S. 838, 864, 894.

trial, confessed error and agreed to vacate his order (Appendix 39a-42a). On appeal, the Court of Appeals affirmed (183 F. (2d) 429). Certiorari was denied by this Court (340 U. S. 917) and a rehearing was denied (340 U. S. 939).

In the meantime the loan by the F.D.I.C. had been repaid and the collateral in its hands was assigned to the Secretary of Banking, who was acting as receiver of the closed bank. Subsequently in distribution of the assets in his hands, the Secretary of Banking assigned to respondents the judgment against petitioners pursuant to an order of the Court of Common Pleas No. 2 of Philadelphia County (Appendix 43a), and it was marked to their use.

On April 24, 1952, petitioners, without further application to the Court of Appeals, filed another motion for new trial with Judge Welsh, and he entered an order granting the same on December 2, 1952 (Appendix 10a). An application for a writ of mandamus and prohibition was promptly filed by respondents with the Court of Appeals. This application was granted (206 F. (2d) 259), and the Court issued writs of mandamus to Judge Welsh and the other judges of the United States District Court for the Eastern District of Pennsylvania directing him and them to vacate the order granting a new trial and prohibiting him and them from proceeding with a new trial in said litigation. Petitioners thereupon filed with this Court the petition for a writ of certiorari now under consideration.

ARGUMENT

There is really but a single question involved in this application for a certiorari, whether a District Court has jurisdiction to grant a new trial in a case which has been

affirmed by the Court of Appeals, a request for permission to grant such a new trial has been refused, and a petition for certiorari has been denied by this Court.

The integrity of the judicial system depends upon the principle that an inferior court must obey and perform the decree of a higher court. In *In re Potts*, 166 U. S. 263, at p. 265, this Court quoted with approval the following excerpt from the opinion in an earlier case:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded."

The principle of this case was fully affirmed and restated by this Court in *National Brake Company v. Christensen*, 254 U. S. 425, at p. 430.

The case at bar has been before the Circuit Court of Appeals six times and each time the decision has been against petitioners. Four applications to this Court for certiorari and ten petitions for rehearing have been made and denied. We submit there should be an end to this litigation; this was clearly the opinion of the Court of Appeals as indicated by the comprehensive order which it made (206 F. (2d) 262) granting writs of mandamus and prohibition not only to the judge who had originally tried the

case but to all judges of the District Court for the Eastern District of Pennsylvania prohibiting them from proceeding with a new trial in said litigation.

Petitioners contend that mandamus and prohibition orders should issue only in extraordinary cases. How could a case be more out of the ordinary than a case with the history of this one? The argument that the order of the Court of Appeals is contrary to the meaning and purpose of Rule 60(b) of the Federal Rules of Civil Procedure, as amended, is without substance. There is nothing in the rule which even suggests departing from the settled principle that after final judgment by a court of appeals the lower court cannot disregard the order of the upper court and proceed according to its own judgment, particularly where in so doing it violates an order which the court above has issued.

It is impossible to escape the conclusion that the actions of petitioners in this long drawn out litigation have been based more upon a desire for delay than any real belief in the correctness of their contentions. The petition should be dismissed.

Respectfully submitted,

THOMAS RAEBURN WHITE,
THOMAS B. K. RINGE,
Counsel for Respondents.

WHITE, WILLIAMS & SCOTT,
MORGAN, LEWIS & BOCKIUS,
of Counsel.

Office - Supreme Court, U.S.
FILED
JAN 2 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953.

No. 473.

HARRY J. ALKER, JR., and MAMIE DuBAN, Individually and as Executrix of the Estate of ALFRED A. DuBAN, Deceased,

Petitioners,

v.

BUTCHER & SHERRERD and FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents.

REPLY TO ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

October Term, 1953. No. 473.

HARRY J. ALKER, JR., AND MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED,

Petitioners,

v.

BUTCHER & SHERRERD AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents.

REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

In their answer to the petition for certiorari, the respondents inadvertently have made incorrect statements as to the history of this matter in their counter statement of the case. Only one is of any significance.

Respondents state "On appeal the Court of Appeals affirmed (183 Fed. 2nd 429)" after having averred that Judge Welsh had previously granted a new trial; F. D. I. C. sought writs for mandamus and prohibition; and Judge Welsh filed an answer to the effect he might have been wrong (P. 3 Respondent's Answer).

An examination of 183 Fed. 2d 429 reveals that three questions were before the Court of Appeals in that case, to wit: 1) whether a judge could vacate the order of another judge in the same matter who was temporarily out of the jurisdiction; 2) whether an order substituting a party could be made while an appeal was pending; and 3) a question as to revival of judgments. The propriety of writs of mandamus and prohibition were not before the Court of Appeals at that time. Hence that question was not before this Court when certiorari was refused at 340 U. S. 917.

Respondents argue that the petition should be dismissed chiefly because this case has been a long time in the Courts. But that in itself is no ground to refuse certiorari. The case of *Klapprott v. U. S.*, 335 U. S. 601 is an example of lengthy litigation in which certiorari was finally granted by this Court. That litigation twice reached this Court on different phases, certiorari being refused once before it finally came before the Court on a phase involving rule 60(b) of the Federal Rules of Civil Procedure. Almost seven years were consumed in the course of that case. So the fact that the litigation is lengthy or that certiorari on a different phase has been refused previously by this Court is no reason for refusal when a proper case for certiorari is presented on an entirely different phase of a matter and under different circumstances.

Respondents contend that Judge Welsh lacked the power and jurisdiction to grant the new trial. In support of their allegations respondents cite two cases—*In Re Potts*, 166 U. S. 263 and *National Brake Company v. Christensen*, 254 U. S. 425. These cases were decided on March 2, 1897, and January 3, 1921, respectively. Petitioners have no quarrel with those cases because they represent the law as it existed in 1897 and 1921. *But that does not say they still represent the law today and that the law has not changed since those times.*

Petitioners contend that the law has been greatly changed and those cases no longer apply due to the recent amendments to rule 60(b). By these amendments to rule 60(b) the jurisdiction of the trial judge has been greatly enlarged, and the District Court now has the jurisdiction to grant a new trial for the reasons and under the circumstances of the present case. In 1897 and 1921 there was no

rule 60(b) or any similar provision in the rules of the District Courts. Hence, the cases relied upon by the respondents clearly have no application to this problem.

If, as the respondents contend by the aforesaid cases, the District Court still lacks jurisdiction and the power to grant a new trial under the circumstances of the present case without first having the approval of the Court of Appeals, then the recent amendments to Rule 60(b), particularly subsections 5 and 6 are meaningless because that was the procedure before the recent amendments to Rule 60(b). The importance of this on the matter of proper federal practice and the jurisdiction of the District Courts is apparent. Hence the petition for certiorari should be granted.

Attention should be directed to the fact that the Court of Appeals originally decided in favor of the Federal Deposit Insurance Corporation because it said the Corporation was protected by public policy—even though it merely held the obligation involved as collateral security for a loan alleged to have been made to it by a state institution which was not so protected; that subsequently the judgment so rendered was reassigned to the Receiver of that state institution; that the Attorney General of Pennsylvania who represented that Receiver agreed to the new trial; that these respondents are merely assignees of that Receiver; that they were not bound by public policy rule; that neither they nor said Receiver could have secured a judgment on that ground; that further the then head of the Fidelity-Philadelphia Trust Company, one of respondents here, had approved while head of the Financial Committee of the state institution the agreement involved.

Attention is also called to the fact that the agreement not to disturb the loan was not for an indefinite period, but was first for a period of five years based on a five year term life insurance policy placed by the Integrity Trust Company on Alker at Alker's expense and held by it as collateral security for the loan, stating to the agent it was making a five year loan. This policy ran from 1931 to 1936. In 1936 the Integrity Trust Company again placed on Alker another life insurance policy for ten years expiring in 1946, they stating to Mr. Alker and to their insurance agent they were extending the loan for ten years and must have a ten-year term policy, which he placed at their orders, and delivered to them. It is also significant that in 1936 new notes were required by the Integrity Trust Company and given by Alker to the bank.

Of further significance is the fact that this was a matter on the equity side of the Court, because more than just a money judgment was sought by the plaintiff (R 82-86, 27A-28A).

In conclusion, it is submitted that on the basis of the foregoing, petition for certiorari should be granted, particularly because of the recent amendments to Rule 60(b) which petitioners contend have enlarged and increased the jurisdiction of the District Court thereby authorizing the trial judge to grant a new trial under circumstances similar to those in this case without first obtaining permission from the Court of Appeals.

Respectfully submitted,

FRANCIS E. WALTER,
EDWIN HALL, II,
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Attorneys for Petitioners.